IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1303

QANTAS AIRWAYS LIMITED,

Petitioner,

v.

FOREMOST INTERNATIONAL TOURS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GEORGE N. TOMPKINS, JR.
Counsel for Petitioner
Qantas Airways Limited
1251 Avenue of the Americas
New York, New York 10020

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Qantas Airways Limited, the defendant and appellant in the proceedings below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

Opinions Below

The opinion of the Court of Appeals is not yet officially reported; the opinion is, however, unofficially reported at 13 CCH AV.L.REP. 18,105 and is printed in the Appendix to this Petition at pages 18a-29a.

The opinion of the District Court is officially reported at 379 F.Supp. 88 (D. Hawaii 1974); the opinion is also unofficially reported at 13 CCH AV.L.REP. 17,204 and is printed in the Appendix to this Petition at pages 30a-52a.

Jurisdiction

The Judgment of the Court of Appeals was entered on October 22, 1975. Appendix, p. 53a. A timely Petition for Rehearing was denied and a timely Suggestion for a Rehearing en banc was rejected by the Court of Appeals by Order entered December 16, 1975. Appendix, p. 54a.

Question Presented

Foremost International Tours, Inc. packaged certain inclusive air tours to the South Pacific. These inclusive air tours consist of air transportation from the United States to South Pacific points, provided by a participating air carrier, and land arrangements such as hotels and car rentals in Australia and New Zealand.

Qantas, who had been a participating carrier, began to package its own inclusive air tours to the South Pacific.

Foremost then brought an action for injunctive relief and damages claiming that Qantas was engaging in a number of anticompetitive practices including the practice of packaging its own inclusive air tours. District Court Complaint, Appendix, p. 55a.

The District Court found that the anticompetitive practices alleged by Foremost were within the "initial" jurisdiction of the Civil Aeronautics Board (CAB) under §411 of the Federal Aviation Act. After a hearing, however, the District Court preliminarily enjoined Qantas with respect to two of the alleged practices, namely, the below-cost pricing of its inclusive air tours and the appropriation of business described as the "switching of tours." The District Court found that Qantas was selling below cost because Qantas was not including in its inclusive tour prices any

of the normal airline overhead costs allocable to the inclusive tours in question.

The District Court issued this injunction under the authority of the Clayton Act, finding that Foremost may be forced out of business and suffer irreparable injury if an injunction did not issue.

At the time the District Court Complaint was filed and at the time the injunction was issued, Foremost had not requested relief from the CAB.

Subsequent to the ruling and injunction of the District Court, Foremost filed a Complaint with the CAB, which in every material respect was identical to the Complaint filed in the District Court. CAB Complaint, Appendix, p. 74a.

The opinion and order of the District Court enjoining these practices was, during this time, appealed to the United States Court of Appeals for the Ninth Circuit, which affirmed the District Court.

Subsequent to the Ninth Circuit's opinion, the CAB took jurisdiction of most of the acts complained of, and most importantly took jurisdiction over the same practices enjoined by the District Court. Petition and Letter of Bureau of Enforcement, Appendix, pp. 94a, 98a.

Therefore, the question presented is:

Whether, pending determination by the Civil Aeronautics Board of alleged anticompetitive practices within its jurisdiction under §411 of the Federal Aviation Act, a District Court may under the Clayton Act enjoin a foreign air carrier with respect to those practices.

Statutes Involved

The statutes involved are the Federal Aviation Act of 1958, as amended, 49 U.S.C. §1301 *et seq.*, and the Clayton Act, 15 U.S.C. §12 *et seq.* The relevant sections of the Federal Aviation Act are §§408, 409, 411, 412, 414 and 1002(j), 49 U.S.C. §§1378, 1379, 1381, 1382, 1384, 1482(j). The relevant section of the Clayton Act is §16, 15 U.S.C. §26. The text of these sections is set forth in the Appendix to this Petition at pp. 1a-17a.

Statement

A. The Facts

Respondent Foremost International Tours, Inc. packages inclusive air tours to Australia and New Zealand from the United States, Canada and other areas. Foremost arranges for the land component portion of an inclusive air tour and markets the tour package (including air transportation) through the auspices of a participating air carrier.

Petitioner Qantas Airways Limited is a foreign air carrier within the meaning of Section 101(19) of the Federal Aviation Act, 49 U.S.C. §1301(19), and is the holder of a Foreign Air Carrier Permit issued by the CAB with the approval of the President pursuant to Sections 402 and 801 of the Act, 49 U.S.C. §§1372, 1461 (Supp. 1975). Qantas under this Permit is authorized to engage in foreign air transportation and carry passengers between the United States, and Australia and New Zealand.

Prior to April 1, 1974, Qantas had been a participating carrier for a group of inclusive air tours packaged by Foremost and marketed under the name of Royal Road Tours.

In November, 1973, Qantas decided to package its own inclusive tours to Australia and New Zealand from the United States through its own tour department, Qantas Holidays, and terminated its relationship with Foremost, effective March 31, 1974.

The sale of inclusive air tours in foreign air transportation is governed by rules and regulations established by the International Air Transport Association (IATA) to the extent approved by the CAB under Section 412 of the Act, 49 U.S.C. §1382.

In 1966 an IATA Resolution filed with the CAB for approval defined the principles under which inclusive air tours may be "initiated" (packaged) by IATA airline members. Qantas is an IATA airline member. The American Society of Travel Agents (ASTA) filed an objection with the CAB against the approval of this IATA Resolution on the grounds that the entry of the airlines into the inclusive air tour market would create substantial unfair competition for the independent travel agency industry. Notwithstanding the objection of ASTA, however, the CAB approved the Resolution under Section 412 of the Act. Order E-24886, March 23, 1967.

Minimum inclusive tour selling prices were also established by IATA Resolutions filed with and approved by the CAB pursuant to Section 412 of the Act. The relevant approved IATA Resolution states:

> "the minimum selling price of the tour per passenger shall not be less than the applicable group inclusive tour fare plus U.S. ~~$100~~ + 130 (US $90 for tours to/from Honolulu) + for the minimum stay plus US $10 for each day of the tour in excess of the minimum stay for which tour features are provided as required by Paragraph (7) above."

Qantas filed tariffs with the CAB incorporating such approved minimum tour selling prices.

On April 1, 1974, Qantas began to market and sell its own inclusive tours to Australia and New Zealand. The prices of the tours were above the approved minimum prices set forth in the IATA Resolution and Qantas' tariffs filed with the Board. 379 F.Supp. at 91-92, Appendix, pp. 33a-36a.

During the period of time after Qantas had terminated its participation in Foremost's Royal Road Tour program and the time Qantas commenced the marketing of its own inclusive air tours, travel agents continued to call Qantas to obtain information about and to purchase Foremost's Royal Road Tours. On one occasion, a Qantas employee sold a Qantas Holiday tour in response to a request concerning a Royal Road Tour. 379 F.Supp. at 92, Appendix, p. 37a.

B. Jurisdiction in the Court of First Instance

Foremost brought this antitrust action alleging violations of Sections 1 and 2 of the Sherman Act and seeking monetary and injunctive relief under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§15, 26.

Jurisdiction in the District Court was based upon 28 U.S.C. §1331 (diversity of citizenship) and 28 U.S.C. §1337 (civil actions arising under an Act of Congress protecting trade and commerce against restraints and monopolies).

C. Proceedings in the District Court

Foremost alleged in its Complaint that Qantas' conduct surrounding its entrance into the inclusive air tour business showed a "clear intent" to "monopolize" the market and that this conduct was "undertaken by Qantas with

the predatory intent and purpose to eliminate Foremost as a competitor in this market". District Court Complaint, Appendix, p. 66a.

Foremost alleged a number of specific anticompetitive acts. However, the specific anticompetitive conduct alleged by Foremost and relevant to this petition relates to:

(1) Qantas' alleged selling of its tours "below their actual cost, and without any provision for normal overhead or profit"; and

(2) Qantas' alleged misappropriation of business "intended for Foremost by inducing actual and prospective customers of Foremost to switch" to Qantas tours.

Simultaneously with the filing of the Complaint, Foremost filed a Motion for a Preliminary Injuction, claiming that it would suffer irreparable injury by being forced out of business if Qantas were not enjoined from the alleged anticompetitive acts.

The District Court concluded, as a matter of law:

> "that entry of Qantas into the inclusive tour business and its below cost pricing practice, switching of tours, as well as the other charges of anticompetitive activity —terminating a business relationship, obtaining confidential information, imitating Foremost's brochures, boycotting, tyings, and dividing the market—are within the initial jurisdiction of the CAB under section 411. 49 U.S.C. §1381." 379 F.Supp. at 94, Appendix, p. 42a.

The District Court, following *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973), determined that it could and would continue to exercise antitrust jurisdiction over the action "but stay most proceedings thereunder pending CAB's determination of Foremost's complaint before the

CAB." 379 F.Supp. at 95, Appendix, p. 44a. At that time, however, no complaint had been filed with the CAB.

After a hearing, the District Court found that Qantas was selling "below cost" because Qantas was not including in its inclusive tour prices any of the normal airline overhead costs allocable to the inclusive tours in question.

The District Court concluded that Foremost would be adequately protected pending final determination of this action by an order:

> "enjoining Qantas from selling its tours at prices that do not include all of the costs actually attributable to the land portions plus a reasonable allocation of its office administration and general overhead expenses and, further, prohibiting Qantas from shifting to itself business committed to or intended for Foremost." 379 F. Supp. at 98, Appendix, p. 49a.

Accordingly, a preliminary injunction was granted as follows:

> "5. Pending final determination of this action, Qantas is hereby restrained and enjoined from selling inclusive 'freewheeling' tours until it has satisfied this court that the portion of the tour price applicable to the land costs includes not only the actual costs charged to Qantas for the land services, including ground and local air transportation services and hotel accommodation, but also generally including, but not limited to, administration expenses, office expenses, salaries, general in-house expenses and, possibly, advertising and brochure costs, related to Qantas' Holiday tours.
>
> 6. Pending final determination of this action,
>
> (a) Qantas is hereby restrained and enjoined from continuing to advertise or otherwise offering for sale

> or selling any of its inclusive South Pacific tours, currently offered, at the prices now set forth in its tour brochures and other advertising media until it has satisfied this court that the land tour portion thereof meets and correctly reflects Qantas' costs, as set out in number 5, *supra,* and this court has approved the same.
>
> (b) In implementing the above restraints,
>
> (1) within 30 days after the effective date of this order, Qantas shall withdraw or otherwise nullify the current authenticity of all of its brochures that contain the above proscribed tour prices;
>
> (2) within 60 days after the effective date of this order, Qantas shall withdraw from its advertising in any news media any reference to the above proscribed tour prices.
>
> 7. Pending final determination of this action, Qantas is hereby restrained and enjoined from shifting or attempting to shift to Qantas Holiday Tours, passengers who have requested or otherwise sought to purchase a Foremost Royal Road Tour to the South Pacific." 379 F.Supp. at 98-99, Appendix, pp. 51a, 52a.

D. Complaint Before the CAB

After the District Court's opinion and order issued, Foremost filed a Complaint with the CAB which was in every material way identical with the District Court Complaint. In its Complaint Foremost asked the CAB to issue "an order directing Qantas to *cease and desist* from engaging in the business of tour operator, from engaging in the above-mentioned unauthorized activities in air commerce and foreign air commerce, and from engaging in the above-

mentioned unfair and deceptive practices and unfair methods of competition." CAB Complaint, Appendix, p. 91a. (Emphasis supplied).

Subsequent to the Ninth Circuit's affirmance of the District Court, the Civil Aeronautics Board took jurisdiction over most of the alleged practices and, most importantly, those allegations dealing with "below cost pricing" and "switching of tours" concerning which the District Court had issued an injunction. CAB Complaint, Third Cause of Action, Appendix, p. 80a and Sixth Cause of Action, para. XV, Appendix, pp. 88a, 89a, and CAB Petition for Enforcement and Letter, Appendix, pp. 94a, 98a.

E. Proceedings in the United States Court of Appeals for the Ninth Circuit

The decision and order of the District Court was appealed to the United States Court of Appeals for the Ninth Circuit. Jurisdiction in the Court of Appeals was based upon 28 U.S.C. §1292(a)(1) as an appeal from an interlocutory order granting a preliminary injunction.

On appeal, Qantas argued that the matters concerning which the District Court issued its injunction were matters within the jurisdiction of the CAB, and the injunction in this case was the kind of collision between administrative and judicial regimes barred by *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963) and other decisions of this Court.

Qantas also argued that the approval of the CAB under §412 of the Federal Aviation Act (49 U.S.C. §1382) of the IATA Resolutions authorizing a foreign air carrier to package its own tours and establishing the minimum prices at which these tours may be sold, immunized Qantas from the antitrust laws, under §414 of the Federal Aviation Act (49 U.S.C. §1384), as long as Qantas sold its tours at or

above the minimum prices established by the IATA Resolution approved by the CAB. Qantas relied in part on *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1973).

Qantas contended that the Board's power to suspend Qantas' tariff under §1002(j) effectively withdrew from the judiciary any pre-existing power to grant injunctive relief as this Court held with respect to the Interstate Commerce Act in *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658 (1963) and *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973).

In affirming the District Court, the Ninth Circuit based its decision on a different ground. The Ninth Circuit found that the tour industry is not *per se* regulated and is separable from the airline industry which is pervasively regulated by the CAB. In that event, where a firm in regulated industry (Qantas in the airline industry) is alleged to have committed acts having an adverse effect on a firm in an unregulated industry (Foremost in the tour industry), the Courts have antitrust jurisdiction and should maintain it, utilizing its powers (including the issuance of a preliminary injunction) as it finds necessary. Court of Appeals Opinion, Appendix, pp. 26a, 27a.

REASONS FOR GRANTING THE WRIT

1. The Ninth Circuit has decided a federal question in a way that conflicts with the applicable decisions of this Court. Supreme Court Rule 19(b).

The critical factual finding upon which the District Court issued the injunction in this case was that, according to the costing factors determined by the District Court to be applicable to the prices at which inclusive air tours may

be sold by an airline, Qantas was selling its tours "below cost".

The District Court found that Qantas was selling below cost because Qantas was not including in its inclusive tour price any of the normal airline overhead costs allocable to the inclusive tours in question. If the overhead costing factors described by the District Court were excluded, Qantas would not have been found to be selling "below cost".

As the District Court itself pointed out, however, the CAB might determine in the public interest that an airline may, in packaging inclusive air tours, pass on to the public land arrangements at cost and need not include a profit factor or the normal airline overhead costs allocable to the tours. 379 F. Supp. at 96, Appendix, p. 45a.

At the heart of this controversy, therefore, is the question of whether the District Court had the jurisdiction to decide the costing factors to be included in Qantas' inclusive air tours; make anti-trust findings regarding "below cost" pricing; and, applying general equity principles, issue a preliminary injunction, pending determination by the CAB.

This case, therefore, involves an important question of the jurisdiction of the District Court to act in an area regulated by the CAB. It is an important question involving the reconciliation of judicial and administrative regimes in effectuating the antitrust policies of the Congress.

a. Conflict with *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963).

In this case the District Court agreed that the CAB had jurisdiction over the alleged practices of Qantas concerning which the District Court issued its injunction. The District Court held that while the CAB had initial jurisdiction, the Court could still act to prevent irreparable harm, pending the CAB determination.

The Ninth Circuit differed with the District Court but reached the same result:

> "Were this an antitrust case where the anticompetitive effects of the complained of action were *confined* to, and primarily affected, the regulated industry, *and* the regulatory agency had the power and authority to protect the status quo, should it deem it necessary, by issuing a cease and desist order, we would then agree with appellant that in issuing a preliminary injunction the District Court would be acting contrary to the intent of Congress when it established regulatory agencies to provide pervasive, coordinated and uniform administration of an industry. These are the basic principles enunciated by the Supreme Court in *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1962)." Court of Appeals Opinion, Appendix, p. 21a.

However, the Ninth Circuit held "this is not such a case". In this case, the Ninth Circuit held that the anticompetitive effects were not so *confined* to the regulated (airline) industry, but had an adverse effect on a firm in an industry (the inclusive tour industry) not regulated by the CAB. In such case, even though the CAB has jurisdiction over the airline's practices, a District Court "should maintain its jurisdiction, and utilize its powers (including

the issuance of preliminary injunctions), as it finds necessary". Court of Appeals Opinion, Appendix, pp. 26a, 27a.

Confirming the CAB's jurisdiction over Qantas' practices, the CAB *in this case* took jurisdiction over the practices enjoined. This is wholly consistent with the fact that the CAB has undertaken to regulate aspects of the inclusive tour industry.[1] Part 378, Inclusive Tour Charters by Supplemental Air Carriers, Certain Foreign Air Carriers and Tour Operators, 14 CFR §378; Part 378a—One Stop Inclusive Tour Charters, 40 F.R. 34089. See, *United States* v. *CAB*, 511 F.2d 1315 (D.C. Cir. 1975).

Thus, in holding that the inclusive tour industry is not within the pervasive regulatory authority of the CAB, the Ninth Circuit was clearly in conflict with the CAB's perception of its jurisdiction. The Ninth Circuit's determination that the inclusive "tour industry" was not part of the "airline industry" pervasively regulated by the CAB was without any basis in the present record and was without the benefit of an administrative record or a determination of jurisdiction by the CAB. See, *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 648 (1972).

This determination by the Ninth Circuit that the inclusive tour industry was separable from the "airline industry" was critical to the result it reached, since the Ninth Circuit

[1] For example, in *Trans World Airlines, Inc., Flying Mercury, Inc.*—Enforcement Proceeding—CAB Docket 24697, Order 73-6-9 (June 4, 1973), the Board dealt with a practice which had developed wherein the land portion of an inclusive tour program was such that the tour participant rarely made use of it and it was therefore, referred to in the industry as a "throwaway". After investigation, the Board ordered TWA and Flying Mercury to cease and desist "from engaging in unfair or deceptive practices and unfair methods of competition within the meaning of Section 411 of the Act" by selling and operating inclusive tours in such a way as to permit the "throwaway" practice to persist. Order 73-6-9, p. 7.

agreed it would hold under *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963) that the District Court could not issue the injunction, if the inclusive air tour industry were under the pervasive regulatory authority of the CAB.

Qantas contends that the costing and marketing of inclusive air tours by airlines are within the pervasive authority of the CAB, and that *Pan American* and other decisions of this court bar the injunctive relief granted in this case by the District Court.

This Court in *Pan American* held that, in enacting the Federal Aviation Act, Congress created a pervasive scheme for the regulation of the air transportation industry and empowered the CAB to regulate it in accordance with the policies set forth in §102 of the Act. 49 U.S.C. §1302. *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963). This Act brought within its regulatory scheme all those who compete in the commercial market in the business of offering air transportation to the public generally. *United States* v. *Caribbean Ventures, Ltd.*, 387 F.Supp. 1256, 1260 (D.N.J. 1974). As a matter of antitrust policy, Congress in §411 of the Act gave the CAB authority to determine unfair practices and unfair methods of competition "by a foreign air carrier" "in air transportation or the sale thereof" and to prevent them by cease and desist orders. 49 U.S.C. §1381. In *Pan American*, this Court barred the courts from deciding whether practices are in violation of the antitrust laws to the extent that §411 was applicable. Otherwise "if the courts were to intrude independently with their construction of the antitrust laws, two regimes might collide". 371 U.S. at 310.

In *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1973), this court described its holding in *Pan American:*

> "(T)his court held that the complaint should have been dismissed because §411 of the Act gave the CAB broad power to investigate and bring to a halt unfair practices and unfair methods of competition, including those alleged in the complaint, and because if the courts were to intrude independently with their own construction of the antitrust laws the two regimes might collide." 409 U.S. at 380.

This principle was further confirmed in *United States* v. *Michigan National Corp.*, 419 U.S. 1 (1974), a case involving the issue whether the Court proceeding should be stayed or dismissed, where the matter was within an agency's primary jurisdiction. This court stated, "We may put to one side cases where the administrative agency has exclusive jurisdiction to consider the complaint initially brought in court, e.g., *Pan American World Airways* v. *United States*, 371 U.S. 296 (1963) . . . . In such cases, the court must of course dismiss the action." 419 U.S. at 4 n2.

See also, *United States* v. *National Ass'n of Securities Dealers, Inc.*, 422 U.S. 694 (1975).

Thus, where, as here, the matters in the District Court complaint fall within the jurisdiction of the CAB under §411, *Pan American* requires a holding that the District Court is precluded, as a matter of jurisdiction, from making antitrust findings on the issue of sales "below cost" and "the switching of tours", and intruding upon the CAB's pervasive regulatory authority by issuing a preliminary injunction.

The holding of the Ninth Circuit in this case is a radical departure from *Pan American*. This Court has never restricted *Pan American* to cases where practices complained of fall within the Board's jurisdiction *and* affect only the regulated airline industry, however defined. The Ninth

Circuit's notion of intra-industry and inter-industry effects is wholly antagonistic to *Pan American*, and was in fact rejected by this Court in *Hughes Tool Co.*

Importers,[2] bus lines,[3] freight forwarders,[4] shippers, travel agents,[5] businesses in which rely on air service for the transportation of goods, fixed based operators[6] and aircraft manufacturers[7] are often affected by CAB decisions within its jurisdiction. Is the CAB's pervasive authority to be restricted when one of these industries is affected by CAB orders?

In *Hughes Tool*, Chief Justice Burger, dissenting, advanced the argument that CAB orders must be restricted in scope and effect to the airline industry and that the regulatory authority of the CAB does not extend to other industries even though connected with the airline industry, such as aircraft manufacturers involved in that case. This view was rejected by this Court. 409 U.S. at 410-411.

In undertaking to protect the unregulated industry by preliminary injunction, the Ninth Circuit has sanctioned the judicial intrusion into the CAB's regulatory authority over foreign air carriers and air transportation. Consistent with the Ninth Circuit's opinion in this case, for example, courts would be empowered to enjoin rates and charges in

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[2] *E.g. American Importers Association* v. *CAB*, 473 F.2d 168 (D.C. Cir. 1972).

[3] *E.g. Transcontinental Bus System, Inc.* v. *CAB*, 383 F.2d 466 (5th Cir. 1967).

[4] *Allied Air Freight Inc.* v. *Pan American World Airways, Inc.*, 393 F.2d 441 (2d Cir.), cert. denied, 393 U.S. 846 (1968).

[5] *McManus* v. *CAB*, 286 F.2d 414 (2d Cir.), cert. denied, 366 U.S. 928 (1961).

[6] *Butler Aviation Co.* v. *CAB*, 389 F.2d 517 (2d Cir. 1968).

[7] *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1973).

collateral civil actions, if they have an adverse effect upon a complaining firm in an unregulated industry.

Instead of uniformity of regulation there would be "operational chaos." *Carter* v. *American Telephone & Telegraph Co.*, 365 F.2d 486, 496 (5th Cir. 1966), cert. denied, 385 U.S. 1008 (1967).

The Ninth Circuit's rationale is a call to the courts to provide antitrust remedies in favor of firms in an unregulated industry where a firm in a regulated industry is accused of an unfair method of competition or deceptive practice affecting them.

The Ninth Circuit's opinion in this case therefore conflicts with *Pan American,* and a writ of certiorari should be granted.

b. Conflict with *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1973)

In this case, the CAB under §412 of the Act approved IATA resolutions authorizing an air carrier to package its own tours and establish the minimum prices at which these tours may be sold. 49 U.S.C. §1382.

The *sole* reason stated by the Ninth Circuit for denying Qantas antitrust immunity under §414 was that:

> "The scope of the antitrust immunity which an agency's approval can confer under statutes such as 49 U.S.C. §1384 was intended to be, and is, no broader than the industry regulated. *Butler Aviation Co.* v. *CAB,* 389 F.2d 517, 521 (2d Cir. 1968). A regulatory agency's approval of certain actions cannot confer antitrust immunity to those actions unless the primary anti-competitive effect those actions may have is limited to the industry in question." Court of Appeals Opinion, Appendix, p. 25a.

Not only does *Butler* hold *contra,* but this Court considered and rejected such an argument interposed by Chief Justice Burger in dissent in *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363 at 410-411 (1973). See also, *McManus* v. *CAB,* 286 F.2d 414, 419 (2d Cir.), cert. denied, 366 U.S. 928 (1961).

There is no provision in the statute which limits the antitrust immunity to intra-industry disputes and this Court has never so limited it. 49 U.S.C. §1384. If the agreement such as the IATA Resolutions in this case are within §412 of the Act and approved by the Board, antitrust immunity is conferred with respect to anything "authorized, approved or required" by the order approving a §412 agreement.

The Ninth Circuit's decision conflicts with the language of the statute and this Court's holding in *Hughes Tool.* A writ of certiorari should issue for that reason.

c. Conflict with *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U.S. 474 (1932) and *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658 (1963)

Even with respect to administrative agencies having less pervasive regulatory authority, this Court has decided that courts should not enjoin an act where the agency may approve it, lest there be collision between the administrative and judicial regimes. *United States Navigation Co.* v. *Cunard Steamship Co.,* 284 U.S. 474 (1932); *Far East Conference* v. *United States,* 342 U.S. 570 (1952). See, *Atchison, Topeka & Santa Fe Ry.* v. *Wichita Board of Trade,* 412 U.S. 800, 818-826 (1973), regarding issuance of injunction pending *review* of administrative determinations.

The lack of jurisdiction in the District Court in this case to enjoin Qantas with respect to the prices at which Qantas may sell its inclusive air tours is further supported by

this Court's decisions in *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658 (1963) and *United States* v. *Students Challenging Regulatory Agency Procedures* (*SCRAP*), 412 U.S. 669 (1973). These cases dealt with the primary jurisdiction of the ICC over rates. In *Arrow*, this Court held that Congress in giving the ICC power to suspend rates withdrew from the courts power to grant injunctive relief with respect to rates. The CAB enjoys the same suspension power. See, *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. at 666 n. 13; *Pillai* v. *CAB*, 485 F.2d 1018 (D.C. Cir. 1973).

As the District Court stated:

> "In 1972, Congress invested the CAB with specific authority to suspend or reject the tariffs of foreign air carriers. Act of Mar. 22, 1972, 86 Stat. 96, Pub. L. 92-259. Thus, the CAB has jurisdiction to grant preliminary relief against foreign air carriers in certain instances . . . .
>
> In the event the CAB interprets broadly its jurisdiction under §1482(j) and suspends or modifies Qantas' inclusive tour fares, this Court would then terminate any portions of the preliminary injunction thus jointly acted upon. This procedure satisfies the rule of *Pan American* that Courts are to avoid interfering with the CAB. 379 Fed. Supp. at 96, 97 n7, Appendix, pp. 46a, 47a.

In this case the action of the District Court barred Qantas from selling its tours in accordance with its tariff on file with the CAB, which tariff the CAB could suspend under 1002(j) of the Federal Aviation Act, 49 U.S.C. §1482(j).

Applying *Arrow* to this proceeding, therefore, because the CAB had the power to suspend the tariff and the

prices at which Qantas was selling its tours, the District Court lacked the power to issue the injunctive relief with respect to the Qantas prices. The result reached by the Ninth Circuit therefore conflicts with this Court's decision in *Arrow* and a writ of certiorari should issue.

Pan American, Hughes, Cunard and *Arrow* converge at a single point—that the District Court in this case was without power to issue the injunction granted in this case, where the matter was within the primary exclusive jurisdiction of the CAB and where the CAB had not yet acted.

The Ninth Circuit's resolution of this question is in conflict with applicable decisions of this Court and a writ of certiorari should issue.

2. The issuance of a preliminary injunction in this case, with respect to matters within the jurisdiction of an administrative agency, prior to agency determination, was unprecedented.

Extensive research has failed to disclose a judicial decision of this Court or any Court which sanctioned injunctive relief by a court against conduct within the jurisdiction of an administrative agency, prior to agency determination.

Contrary to the decision below, the District of Columbia Circuit decided that in a similar case the District Court may not grant injunctive relief. In *S.S.W., Inc.* v. *Air Transport Ass'n of America*, 191 F.2d 658 (D.C. Cir. 1951) the Court said:

> "Comparison of these provisions of the Civil Aeronautics Act with the allegations of the complaint reveals that that Act 'covers the dominant facts alleged in the present case as constituting a violation of the Anti-Trust Act'. As a result, appellant must first seek

relief from the Board. The principles underlying the doctrine of exhaustion of administrative remedies as well as the antitrust regulated industry problem point to the importance of giving the Board the first opportunity to determine the extent of its jurisdiction and to deal with matters falling within its reach. The Board may grant him all the prospective relief sought by him, since it, unlike the Interstate Commerce Commission, is empowered to issue cease and desist orders against unfair methods of competition and deceptive practices and to entertain any complaint and issue any orders necessary to carry out its power to approve or disapprove contracts and agreements among air carriers.

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The Board may, of course, ultimately determine that it lacks jurisdiction over certain phases of the complaint. In that event, there will be no conflict of authority between antitrust laws and specific statute and jurisdiction will remain in the District Court to deal with such matters. But, as we have indicated, that cannot be known until the Board has had an opportunity to act on these allegations. Until it has done so, injunctive relief in the District Court is unavailable." 191 F.2d at 662, 663.

Cf. Laveson v. *Trans World Airlines*, 471 F.2d 76, 83-84 (3d Cir. 1972).

Other cases involving agencies with *less* pervasive regulatory authority have also held that an injunction should not issue on matters within the agency's jurisdiction prior to agency determination. *MCI Communications Corp.* v. *American Telephone & Telegraph Co.*, 496 F.2d 214 (3d Cir. 1974), *affirming*, 369 F.Supp. 1004, 1020 (E.D. Pa. 1974) (where irreparable injury was shown); *Delaware*

River Port Authority v. *Transamerican Trailer Transport, Inc.*, 501 F.2d 917, 923 (3d Cir. 1974); *Carter* v. *American Telephone & Telegraph Co.*, 365 F.2d 486 (5th Cir. 1966), cert. denied, 385 U.S. 1008 (1967).

Wheelabrator Corp. v. *Chafee*, 455 F.2d 1306 (D.C. Cir. 1971) relied upon by the Ninth Circuit does not hold that an injunction may issue against conduct within the jurisdiction of an agency, pending agency *determination*. The "agency" in that case (the General Accounting Office) did not have the power to *decide* the questions and issue orders relating thereto. The Court did. The GAO acknowledged that its action would not operate "as a legal or judicial determination of the rights of the parties". 455 F.2d at 1313.

Wheelabrator relates to the issuance of preliminary injunction over matters within a court's sole jurisdiction, and not to a collision of administrative and judicial regimes.

The decision of the courts below have placed Qantas in the position of satisfying both the District Court and the CAB with respect to its inclusive air tour prices. The uniformity of treatment of air carriers and foreign air carriers and the uniformity of regulation of the air transportation industry which the Federal Aviation Act was designed to achieve has been disturbed and compromised by the decisions of the courts below.

The injunction issued in this case has brought the CAB and the courts on a collision course which *Pan American* and the other cases cited by this court have repeatedly stated should be avoided. The injunction issued has disrupted an airline, regulated by the CAB, in the marketing of its air transportation and is an impermissible intrusion of the CAB's pervasive regulatory authority.

At issue here, therefore, are the respective roles and powers of the CAB and the courts in the regulation of the air transportation industry and the implementation of congressional antitrust policy. The subject matter of this controversy is the airline operated inclusive air tour, at a time when both the airlines and the CAB are attempting to provide new forms of low-cost air travel to the public. The issue to be decided in this case is, therefore, also an important industry question.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case, as prayed for herein.

GEORGE N. TOMPKINS, JR.
Counsel for Petitioner
Qantas Airways Limited
1251 Avenue of the Americas
New York, New York 10020

Dated: New York, New York
March 12, 1976

Of counsel:

CONDON & FORSYTH
THOMAS J. WHALEN
MICHAEL J. HOLLAND

Affidavit of Service

I, MICHAEL J. HOLLAND, being over the age of 18 years, an associate attorney employed by the firm of Condon & Forsyth, hereby certify that I have this 12th day of March, 1976, served three copies of the foregoing Petition for a Writ of Certiorari upon Respondent Foremost International Tours, Inc. by mailing copies thereof to its attorneys of record in sealed envelopes, with air mail postage prepaid, deposited in The United States General Post Office, located at 33rd Street and 8th Avenue, New York, New York 10001, and addressed as follows:

Alexander Anolik, Esq.
693 Sutter Street
San Francisco, California 94109

Melvin Shinn
Suite 223, 33 S. King Street
Honolulu, Hawaii 96813

/s/ MICHAEL J. HOLLAND
Michael J. Holland

Sworn to before me this
12th day of March, 1976

/s/ LAWRENCE MENTZ
Notary Public

Lawrence Mentz
Notary Public, State of New York
No. 31-4513579
Qualified in New York County